Supreme Court of the United States

OCTOBER TERM, 1952.

No. 51.

F. DONALD ARROWSMITH AND RUTH R. BAUER, Executors of the Last Will and Testament of FREDERICK R. BAUER, Deceased, and RUTH BAUER, *et al.*,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR REHEARING.

GEORGE R. SHERRIFF,
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COME Now the above-named Petitioners and present this their Petition for a rehearing of the above-entitled cause, and in support thereof respectfully show:

1.

The majority opinion effectively nullifies the previously well-established principle that each taxable year is a separate unit, and overrules the prior decisions of this Court establishing that rule.

The rule requiring annual accounting not only prevents the reopening of closed years, but also prohibits the striking of net results over several years. *Burnet* v. *Sanford & Brooks Co.*, 282 U. S. 359; *Security Flour Mills Co.* v. *Com-*

missioner, 321 U. S. 281. The majority opinion strikes a net result over several years by treating the 1944 loss as reduction of the 1940 gain.

This is directly contrary to the *Sanford & Brooks* case where this Court prohibited use of the net result in a later year. There the transaction resulted in losses in earlier years. In a later year gain was realized from the same transaction and the taxpayer sought to strike a net result by applying the earlier year's loss to diminish the later year's gain. This Court stated the question to be

> "* * * whether the gain or profit which is the subject of the tax may be ascertained, as here, on the basis of fixed accounting periods, or whether, as is pressed upon us, it can only be net profit ascertained on the basis of particular transactions of the taxpayer when they are brought to a conclusion. * * *" (pp. 362, 363)

This Court refused to permit striking a net result from the beginning to the end of a given transaction over several years as violating the annual accounting rule, and said:

> "* * * A taxpayer may be in receipt of net income in one year and not in another. The net result of the two years, if combined in a single taxable period, might still be a loss; but it has never been supposed that that fact would relieve him from a tax on the first, or that it affords any reason for postponing the assessment of the tax until the end of a lifetime, or for some other indefinite period, to ascertain more precisely whether the final outcome of the period, or of a given transaction, will be a gain or a loss. * * * While, conceivably, a different system might be devised by which the tax could be assessed, wholly or in part, on the basis of the finally ascertained results of particular transactions, Congress is not required by the amendment to adopt such a system in preference to the more familiar method, even if

> it were practicable. It would not necessarily obviate the kind of inequalities of which respondent complains. If losses from particular transactions were to be set off against gains in others, there would still be the practical necessity of computing the tax on the basis of annual or other fixed taxable periods, which might result in the taxpayer being required to pay a tax on income in one period exceeded by net losses in another." (pp. 364, 365, 366)

While the majority opinion does not reopen the earlier year it approves the striking of a net balance of the entire transaction in a later accounting year. It treats the later year's loss as diminution of the earlier year's gain. If this is correct it necessarily follows that a net result must be reached where, conversely, a loss in the earlier year is followed by gain in the later year, which reduces the earlier year's loss as in the *Sanford & Brooks* case. If the majority opinion is correct, the decisions in *Burnet* v. *Sanford & Brooks Co.*, 282 U. S. 359; *Security Flour Mills Co.* v. *Commissioner*, 321 U. S. 281; *U. S.* v. *Lewis*, 340 U. S. 590; and *U. S.* v. *White Dental Manufacturing Co.*, 274 U. S. 398, have been incorrectly decided.

In the *Security Flour Mills* case this Court said:

> "* * * In short, the petitioner's position is that the Commissioner and the Board of Tax Appeals are authorized and required to make exceptions to the general rule of accounting by annual periods wherever, upon analysis of any transaction, it is found that it would be unjust or unfair not to isolate the transaction and treat it on the basis of the long term result. We think the position is not maintainable. * * *" (p. 285)

The majority opinion here is in direct conflict with these cases.

The Commissioner has consistently sought enforcement of the annual accounting rule where it is to his advantage. *Burnet* v. *Sanford & Brooks Co.*, 282 U. S. 359; *Security Flour Mills Co.* v. *Commissioner*, 321 U. S. 281; *U. S.* v. *Lewis*, 340 U. S. 590. He should not be permitted to disregard this rule where in an isolated case, as here, it works to his disadvantage. *U. S.* v. *Lewis*, *supra*.

While not so specifying, the majority opinion reverses and nullifies said earlier decisions of this Court upon which the "well-established principle that each taxable year is a separate unit"[1] is founded. That "well-established" principle again becomes unsettled. The mandate of the *Lewis* case that this Court should not "depart from this well-settled interpretation merely because it results in an advantage or disadvantage to a taxpayer"[2] becomes meaningless.

The inevitable result will be further confusion and litigation which this Court must ultimately again determine. The problem should be put at rest here by continued consistent application of the annual accounting rule.

For the foregoing reasons it is respectfully urged that this Petition for rehearing be granted and that the majority opinion of the Supreme Court of the United States of November 10, 1952 be, upon further consideration, reversed.

Respectfully submitted,

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Joseph C. Woodle,
Of Counsel.

Dated: New York, N. Y., November 17, 1952.

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[1] Majority Opinion p. 3.
[2] 340 U. S. at p. 592.

Certificate.

I, GEORGE R. SHERRIFF, Counsel for the above-named Petitioners, do hereby certify that the foregoing Petition for a rehearing of this cause is presented in good faith and not for delay.

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